No. 6.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

GRAND RIVER DAM AUTHORITY,
Petitioner,

v.

GRAND-HYDRO,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oklahoma.

BRIEF FOR THE RESPONDENT IN REPLY TO BRIEF FOR THE UNITED STATES, AMICUS CURIAE.

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I.

THE INTEREST OF THE UNITED STATES.

On page 8 of the second brief amicus,[1] the first interest which it is asserted that the United States has in this matter is that the upholding of the award in this case will make it difficult for the Federal Power Commission to

1 Herein the brief for the United States, amicus curiae, in support of petition for writ of certiorari is referred to as "the first brief amicus curiae," and the brief for the United States, amicus curiae, being its brief upon the merits, is referred to as "the second brief amicus curiae."

disallow "hypothetical value" as a part of the licensee's net investment. The petitioner's position here seems to be compounded of two arguments. The first is that the price paid by a licensee as a result of condemnation proceedings brought by it is not "reasonable." The second is that the value is purely "hypothetical," in other words imaginary, or purely assumed and not proven.

So far as the including within net investment of awards arrived at in condemnation proceedings is concerned, we submit that such figures are reasonable and entitled to be included as a part of net investment.

With respect to the "hypothetical value" argument, we agree that the net investment of a licensee of the Federal Power Commission should not include any assumed or imaginary or unreal values. The difference between the brief amicus and the respondent, in their attitudes towards the testimony in this case, is simply that the Solicitor General chooses to assert repeatedly that the positive statements of opinion of qualified men that this land had a value from $750,000 to $1,000,000 was not evidence of fair market value but in some way amounts to merely "assumption" of powersite value or to testimony of merely "hypothetical" value. An appraiser, whether of an office building site, an oil field, a dam site, or of any other kind of land, does not merit the derogatory charge that he has arrived at an estimate of merely a "hypothetical" value, simply because he has considered the range of types and sizes of structures which can be accommodated to the land, and has attempted to reach a sound judgment as to whether the use of the land for the envisioned purpose or purposes will likely be a profitable, or income producing, use.

The second reason asserted for the interest of the United States (p. 9) is that the upholding of the award in this case

"is likely to have a strong effect as a precedent in suits brought by the United States itself to condemn lands useful as a site for a hydro-electric project drawing power from the waters of a non-navigable stream whose flow affects navigable waters (Cf. **United States ex rel. T. V. A. v. Powelson**, 319 U. S. 266, 273)."

The first answer to this position is that the kind of suit in which counsel fears the United States will be prejudiced is a suit brought by the United States itself, and not by mere privately or publicly owned utilities, such as instituted the present case. This is distinction enough.

Furthermore, so far as are concerned future suits brought by the United States to condemn land for the **sole** purpose of hydro-electrical generation, it will be right and appropriate that the upholding of the award in this case shall have a strong effect. The United States is not authorized by the commerce clause to condemn land for hydro-electric purposes. When it does condemn land for that purpose, and the tests of reasonableness in ascertaining fair market value actually have been met, the United States rightly should be obligated to pay a value arrived at after consideration of adaptability to power dam construction. The action of the United States, in such case, will amount to an appropriation for public use covered by the Fifth Amendment. This court so held with respect to the canal lands in **United States v. Chandler-Dunbar Company**, 229 U. S. 53.

Apparently, the brief amicus seeks to assert merely that this court's upholding of the award will prejudice the United States in situations such as that in the Powelson case, where there was a prospect of power use only as an incident to works of flood control and navigation. If the position of the brief amicus is thus narrowed, the uphold-

ing of the award in this case will not prejudice the United States. In the Powelson situation the United States was itself the actor and it was merely exercising its regulatory power and was not condemning for power purposes, even in part.

With respect to all interests which it is asserted that the United States has in this case, the Solicitor General is simply trying to get this court to pass upon abstract questions, not justiciable in this cause, and not arising between the parties to this cause. This court will not do so. See Respondent's brief on the merits, pp. 43-50.

II.

REPLY TO THE ARGUMENT OF THE SECOND BRIEF AMICUS.

The first point of the second brief amicus (p. 16) is: "The court below erred in holding Grand Hydro entitled to compensation for any powersite value of the lands taken."

(a) What the State Court Held.

This statement is first predicated (pp. 16-31) upon the oft repeated misinterpretation of the state court's opinion, for instance, on page 18 of this brief, in referring to Grand-Hydro's lack of a Federal license, the state court's opinions are described as ". . . treating such lack of Federal permission as not rendering **use** for water development by the condemnee unlawful." It is not necessary here to repeat our analysis of the court's opinion (see Respondent's brief on the merits, pp. 16-21), which demonstrates that the state court simply held that the condemnee need not have a Federal license in order to **prove damsite value.** The question of whether the condemnee could **use** or **develop** the site without a Federal license was not before the

state court. The condemnee was not trying to build a dam, but to get fair market value.

(b) The Claim That There Was No Compensable Property Interest.

The second brief amicus next makes the point that: "Power site value based on a hypothetical development requiring Federal license is not a compensable private property interest" (p. 31).

Let us first delete the inaccurate phrase "a hypothetical development" and substitute for it the phrase "adaptability and availability for a use," so that consideration of the argument will not be handicapped by misapprehension of the character of proof which the respondent supplied with respect to value. Thus the point made by the second brief amicus on page 31 is that "Power site value based on adaptability and availability for a use requiring Federal license is not a compensable private property interest."

There appears to be no reason why the requirement of the Federal license destroys property rights any more than the requirement of a building permit or an oil drilling permit by a municipality or by a state. The second brief amicus recognizes (pp. 46-47) that "Real estate best utilized as the site of an office building need not be valued as agricultural land simply because a building permit must first be obtained. In such a case, the likelihood of obtaining such a permit would be relevant to a determination of value; the need for a permit would not, however, foreclose inclusion of the value of the land as a building site."

This is a correct statement of the position that we take with respect to the Federal license provided for by the Federal Power Act. The brief amicus undertakes, how-

ever, to distinguish the two situations upon the ground, first (second brief amicus, p. 32), that there is no private property right in the use of water for power purposes where such use affects navigable waters of the United States.[2] To support this statement the brief amicus can and does cite (p. 37) only cases in which the United States was a party, namely, the **Chandler-Dunbar** case, 229 U. S. 53; the **Willow River Power Company** case, 324 U. S. 499; the **Washington Power Company** case, 135 F. (2d) 541; the **Continental Land Company** case, 88 F. (2d) 104, and the **Appalachian Electric Power Company** case, 311 U. S. 377. In the first four of these cases the United States was acting directly, in the exercise of its power to regulate commerce, under congressional acts which expressly recited the purpose of improvement of navigation and precluded, rather than invited, private development of water power. All five cases have been discussed in Respondent's brief on the merits, and the non-applicability here of decisions such as the first four is elsewhere discussed herein.

United States v. Appalachian Electric Co., 311 U. S. 377, is the only case that is cited on this point which involved the Federal Power Act. In that case the court was acting with respect to a navigable stream and, like the other cases, the United States was the complaining party. The holding was that a Federal Power Commission license must be obtained before a water power development can be built and that the recapture provisions of the Federal Power Act are valid. The holding has no relation to a condemnation proceeding by a licensee of the Federal

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[2] To the statement that the River and Harbor Act of 1890 was enacted "before any substantial economic interests in hydroelectric power development could have arisen" (pages 32-33), we reply, first, that mere smallness in amount of economic interest does not validate federal annulment of property rights by bare congressional act, and, second, the Federal government had stood by for over one hundred years before 1890 and allowed the courts of the states to develop their water laws and water rights without objection. Cf. **United States v. Central Stockholders' Corporation**, 52 F. 2d 322, 324.

Power Commission against a land owner who is not trying to develop but is seeking mere market value.

On page 42 of the second brief amicus curiae it is said with respect first, to the **Willow River Power Company** case, supra, and next with respect to the Federal Power Act, "by physical action in one case, by statute in the other, the Federal Government has limited the use of flowing water so as to preclude realization of economic value therefrom."

We agree that the physical action taken by the United States in the **Willow River Power Company** case prevented the upstream dam owner from getting as much power out of the water as formerly, because of loss of head due to a navigation improvement by the United States Government, and we do not criticize the denial of compensation in that case, because no taking was involved, either in the sense of actual appropriation, or in the sense of appropriation for public use as occurred in the case of the canal lands in the Chandler-Dunbar case.

We do not agree that the Federal Power Act precludes the realization of economic value from flowing water. The Solicitor General's statement indeed seems inconsistent, even meaningless, when compared with his other statements to the effect that the very purpose of the Federal Power Act was to remove impediments to the development of the water power resources of the country (second brief amicus, page 35), and to bring about a development of such, "fair to the developer, the investor, the Government, and the consumer . . . ." (Second brief amicus, page 59). The claim of the brief amicus that the Federal Power Act had the effect of precluding realization of economic value from the use of flowing water, if sustained, would mean the defeating of the purpose of the Act, which was to encourage the realization of such economic value.

The second brief amicus persists in an effort to treat alike prohibitory statutes, such as those involved in the **Willow River Power Company** and **Chandler-Dunbar Company** cases, and a permissive statute, the Federal Power Act. For instance, the case of **Oklahoma v. Atkinson Company**, 313 U. S. 508, is cited despite the fact that the statute that there authorized the construction of the Denison dam recited the purpose of "improvement of navigation and the control of destructive flood waters and other purposes" and never mentioned any purpose of promoting the generation of power by the employment of private capital (Act of June 28, 1938, 52 Stat. 1215, sec. 4; see 313 U. S. 510, footnote 1).

We have already shown, contrary to the insistence of the second brief amicus (pp. 48-49), that the courts have held consistently that the licensee of the Federal Power Commission is not an agent of the United States and does not occupy the same position the United States would occupy if it had undertaken itself to construct the project. Respondent's brief on the merits, pages 21-32.[3]

(c) The Claim That the Rate Base Cannot Include This Award.

The second brief amicus undertakes to maintain the position (pages 50, 52) that the valuation testimony of respondent's witnesses was affected by anticipated revenue, that is, by the attractiveness of the land as a potential income producer, and that this improperly tainted the valuation because no rate base could be expected which would include the value to which they were testifying. With respect to what the rate base should

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3 Contrary to the footnote, second brief amicus, page 49, the United States, in condemning flowage rights for the top five feet of the Pensacola storage, will be governed by Oklahoma law, because the United States is not acquiring such rights for itself, but for the Grand River Dam Authority. Cf. **United States v. Oklahoma**, 168 F. 2d 858, 860.

include, the effect of section 14 of the Federal Power Act would be (a) if Grand-Hydro were the licensee, to limit and fix its net investment for lands, water rights, etc., to the several hundred thousand dollars it has actually spent for such property or (b) if, as here, the Authority is the licensee, to fix its net investment for the land here condemned at the amount of the award, $800,000. In both instances the amount would be "the actual reasonable cost" as provided in section 14. In neither situation would such allowance include, or be affected by, "prospective revenues" in the sense prohibited by section 14. If section 14 has any limiting effect on the amount of the award in condemnation proceedings, it requires nothing more than the exclusion of "damage to that form of property known as business or the good will of a business." Cf. Oldfield v. Tulsa, 170 Okla. 329, 41 P. (2d) 71, 98 A. L. R. 953, 956. No such damage is included in the award in the case at bar. When opposing counsel undertakes to exscind from "actual reasonable cost" all implicit reference to future potentialities of property, he undertakes the impossible, because in every transaction of bargain and sale between human beings, done as an incident to a business program, the very purpose of the transfer and acquisition normally is the production of income.

The error in the position of the brief amicus is cleanly and plainly emphasized by certain portions of the quotations which it takes from the opinion of the Federal Power Commission in **Alabama Power Company**, 1 F. P. C. 25, 36-37 (see second brief amicus footnote 16, page 63), namely, "It [the right to develop water power in a navigable stream] is entitled to no allowance under the Federal Water Power Act **other than what it costs to acquire it** . . . values for franchises are not allowable for regulatory purpose **except to the extent of the actual cost incurred for their acquisition.**" The amount of the award in this case is the actual cost of the land and appurtenant

rights described in the condemnation petition. The Authority is entitled to include it in net investment, just as much as the amounts paid for the 16,000 to 18,000 acres of the reservoir lands which had to be condemned (R. 524, 525).

The second brief amicus (pp. 62-65), while recognizing that the Federal Power Commission and certain circuit courts of appeal in practice have included the actual reasonable cost of water rights, damsites and riparian lands in net investment (**Alabama Power Company v. McNinch**, 94 F. 2d 601, 615-616; **Alabama Power Company v. F. P. C.**, 128 F. 2d 280, 283; **Alabama Power Company v. F. P. C.**, 134 F 2d 602) cites the cases of **Niagara Falls Power Company v. F. P. C.**, 137 F. 2d 787, 791, and **Wisconsin Public Service Corporation v. F. P. C.**, 147 F. 2d 743, as holding that state permits or state derived rights "are insufficient." These two cases have nothing to do with section 14 of the Federal Power Act. They construe only section 23 of the Act, which provides in substance, with respect to projects already in existence in 1920 (when the Federal Power Act was enacted) and which were operating under "any permit . . . granted prior to June 10, 1920," that "fair value" should be allowed as part of net investment, instead of mere "actual reasonable cost." The holding of the court in each case was that "any permit" meant a Federal permit, not one issued by a state. Thus these two decisions put those project owners, who in 1920 possessed only state permits, on the same footing with projects built since 1920, so that in all such cases the allowance of net investment is limited to actual reasonable cost. These cases do not deny the validity of state permits; they simply hold that they are subject to superior Federal regulation and section 23 was construed accordingly. The case of **Pennsylvania Water & Power Company v. F. P. C.**, 123 F. 2d 155, does not seem to strengthen the argument of the amicus curiae, since the opinion in that

case is almost entirely devoted to a discussion of the criteria of navigability and whether there was a valid Federal permit for the power company's project.

The contention of the briefs amicus (e. g., second brief amicus, pp. 52-53) is that the Federal Power Act prohibits the inclusion of water power rights in "net investment" because (a) they have no value apart from the Federal license and (b) because in the determination of their price in the sale from the owner to the licensee, a capitalization of "prospective earnings" is or was unavoidable. Therefore, argues the brief amicus, no value can be allowed to water rights appurtenant to lands being condemned by a licensee, since the condemnee lacks the Federal license and, moreover, cannot prove, without capitalizing prospective revenue, that the appurtenant water rights enhance the value of the land.

To point (a) above—the argument in which the Federal license is described as the "sine qua non" of the earnings and value of appurtenant water power rights—we answer as follows: The contention is that the natural conditions of the land, its locality, its slope and general terrain, have no bearing on its value for damsite purposes, but the only thing that can be looked to is the paper issued by the Federal Power Commission. It is to say that a vacant lot in the downtown section of a large city has no value for building purposes in and of itself, but that the building permit which is received from the municipality may carry a value of two or three million dollars. This sort of argument springs from conceptions patently incompatible with the respect which the Federal Constitution accords private property rights, and the assurance that it affords against their confiscation through either the granting or refusal to grant a license by the Federal Power Commission, or action by it or any other agency of the Government. Moreover, the argument completely ignores the fact that the

Federal license does not carry with it any ownership of lands nor any rights appurtenant to the lands. The lands are far more necessary to the project than the license. The landowner, without the license, has as much right and more opportunity to build a project than the licensee who does not own the lands and appurtenant rights.

To point (b) above—the argument that water-power rights cannot be included in "net investment", although the owner charged and the licensee paid a reasonable price therefor, because the fixing of the price unavoidably involved a "capitalization of prospective earnings" prohibited by section 14 of the Federal Power Act—we answer as follows:

(1) The contention relates only to the fixing of net investment and presents an abstract question not present in this case. See Respondent's brief on the merits, p. 43 et seq. The case at bar is a condemnation case in the courts, not a proceeding before the Federal Power Commission to fix net investment of the licensee. The two proceedings are different. The condemnee has waived nothing, whereas the licensee may have waived its rights in order to get a license. Cf. **U. S. v. Appalachian Electric Power Company,** 311 U. S. 377, 427. The petitioner and the Solicitor General apparently have joined hands in an effort to get this court to render an advisory opinion as to whether the award in this case can be included in the net investment of the petitioners. The second brief amicus cites decisions of the Federal Power Commission pertaining to net investment (pp. 65-66) as if they have some bearing on the fixing of just compensation in judicial proceedings, a matter as to which the Commission has no jurisdiction and its opinions or practices have no weight. A decision that the petitioner is not entitled to include this award in its net investment will not at all mean that Respondent is not entitled to the award fixed by the state court. The court

should reject this effort of opposing parties to induce it to depart from the rule which confines decisions to actual questions between actual parties.

(2) Just compensation must be paid in condemnation proceedings, and the amount and measure of it are judicial matters, not subject to fixing or limitation by any legislature, including Congress. **Monongahela Navigation Co. v. United States,** 148 U. S. 312. Even though the condemning licensee may not be entitled to include the amount of just compensation in its net investment, it must nevertheless pay the full award to the condemnee.

(3) Without waiving our position in the two paragraphs immediately above we further assert that it is the intention of the Federal Power Act that the determination of whether respondent's rights to use the water were compensable rights, and the amount of compensation, must be according to state law. We proceed to an analysis of that Act.

(d) **Analysis of Federal Power Act.**

The opinion of this court in **First Iowa Hydro-Electric Co-op. v. Federal Power Commission,** 328 U. S. 152, 90 L. ed. 1143, contains much material upon which the court relied in showing that Congress, in enacting the Federal Power Act, intended so far as possible to retain and not to supersede or interfere with the laws of the various states. Noteworthy is the quotation from Representative LaFollette at 90 L. ed. 1155, and this court accepted as true the assertion therein that, "* * * We have not infringed any of the rights of the states in this respect, or any of their rules of property * * *." This court said that the Federal Power Act "discloses both a vigorous determination of Congress to make progress with the development of the long idle water power resources of the nation and a deter-

mination to avoid unconstitutional invasion of the jurisdiction of the state." (90 L. ed. 1153). It is further said, "The Act reserves to the states their traditional jurisdiction subject to the admittedly superior right of * * * Congress, to regulate interstate * * * commerce * * * " (90 L. ed. 1153).

The determination of property rights in the use of water has fallen within the traditional jurisdiction of the states. In this respect no distinction has been taken by state law between power rights on the one hand and recreational, domestic, irrigation and municipal rights on the other hand. Congress had no intention and no power to specify by the Federal Power Act that certain property rights under state law should be inviolate, while others should be disregarded, in condemnation proceedings by a licensee engaged in taking such rights for use, as distinguished from regulatory action by the United States itself involving the prohibition or destruction of rights, rather than the appropriation thereof. Congress would have no power to deny the respondent water power value and at the same time permit the recovery of water recreation value. Petitioner would be obligated to pay the latter just as much as the City of Tulsa was. Cf. **City of Tulsa v. Creekmore**, 167 Okla. 298, 29 P. (2d) 101.

In the First Iowa Electric Co-operative case, supra, the court makes clear its construction of the Federal Power Act to be that the laws of the states respecting water power rights as property should not be disturbed. The court says:

> "The reference made in section 9 (b) to beds and banks of streams, to proprietary rights to divert or use water, or to the legal right to engage locally in the business of developing, transmitting and distributing power neither add anything to nor detract anything from the force of the local laws, if any, on those

subjects. Insofar as those laws have not been superseded by the Federal Power Act they remain as applicable and effective as they were before its passing" (90 L. ed. 1157).[1]

Just as in **Oakland Club v. S. C. Public Service Auth.**, 110 F. (2d) 84, 86, it was reasoned that the provisions of the Federal Power Act with respect to eminent domain were so abbreviated that Congress did not intend to exclude the state law, it should be soundly reasoned in the instant case that the failure of the Act even to attempt to set up categories of rights which shall be recognized or not recognized, shows an intention to leave the determination of property rights to state law.

In the Federal Power Act the clear purpose was the encouragement of the enjoyment of water power rights. It is illogical to say that in an act passed for the very purpose of inducing the investment of private capital in projects to harness and use the power of the flowing waters of the country, Congress should intend that private property rights therein, which had theretofore been recognized, should not merely be refused further recognition, but

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[1] Even were the restrictive words of Section 27 omitted from the act, the rights of this respondent would be determined by a reference to the Oklahoma rules of property. In the case of **United States ex rel. T. V. A. v. Powelson**, 319 U. S. 266, 87 L. ed. 1390, this court said at page 279:

"* * * Though the meaning of 'property' as used in sec. 25, 16 USCA, sec. 831x, 5 FCA, title 16, sec. 831x, of the Act and in the Fifth Amendment is a federal question, it will normally obtain its content by reference to local law. Yet when we look to local law in the present case, we find no indication that for purposes of condemnation proceedings instituted by North Carolina the value of the lands in question would be increased by reason of respondent's privilege to use the power of eminent domain."

See also 87 L. ed. 1404.

To the same effect are Ford & Son v. Little Falls Fibre Co., 280 U. S. 369, 74 L. ed. 483; Fox River Paper Co. v. R. R. Comm., 274 U. S. at 655, 71 L. ed. at 1283; U. S. v. Central Stockholders Corp., 52 F. (2d) 322; Union Electric Light & Power Co. v. Snyder Estate Co., 65 F. (2d) 297; Great Northern Paper Co. v. Washington Ry. Co. (Sup. Ct. Wash.), 86 P. (2d) 208; Grand River Dam Atuhority v. Board of Education, 193 Okla. 551, 147 P. (2d) 1003, cert. den. 322 U. S. 733, 88 L. ed. 1568; Feltz v. Central Nebraska Public Power & Irrigation District, 124 F. (2d) 578.

should be superseded and, therefore, no longer exist. It is said:

> "The present Act was distinctly an effort to provide federal control over and give federal encouragement to water power development * * * the bill was to provide a method by which the water powers of the country, wherever located, can be developed by public or private agencies under conditions which will give the necessary security to the capital invested and at the same time protect and preserve every legitimate public interest * * *." Footnote 23, 90 L. ed. 1159.

The apparent objective of the petitioner's arguments and those of the amicus curiae in this case is to take away all "the necessary security to the capital invested." But, it may be said, such reinterpretation of the Act as they propose can have only a prospective effect, for they may not be proposing to disturb the allowances of net investments already fixed. Cf. **Alabama Power Co. v. F. P. C.**, 128 F. (2d) 280, 283. In many other situations, however, including those in which net investment has not been fixed, such as the case at bar, the capital has already been invested in these property rights and now it is said such capital is not to be "secured" or protected, but was simply wasted in buying something that didn't exist. It is plain that the Act intended to protect outlays such as respondent Grand-Hydro's heavy capital investment, not merely that of licensees, such as the petitioner in this case, for the reason that heavy expenditures are frequently and reasonably made, before licenses are obtained, in order to find out whether particular locations are susceptible to development and worthy of licenses.

It is important right here and now to emphasize the fact that the Federal Power Act is not a statute under which the United States itself acquires lands and water rights and builds projects. This act expressly contemplates that

all such development directly by the United States shall be especially considered and authorized by Congress after study and recommendation by the Commission. Sec. 7 (b). Therefore, decisions such as that in the Chandler-Dunbar case, which arise under other acts of Congress giving special authorization for direct action by the United States itself and prohibiting private water power development, are automatically inapplicable to condemnation proceedings under the Federal Power Act, where the condemnor generally is a privately owned utility or, as here, is a utility owned by a state, and private power developments are encouraged, not prohibited. Similarly, in any condemnation proceedings under the Tennessee Valley Authority Act (48 Stat. 58, 16 USCA, sec. 831 et seq.), the act authorizing the Bonneville Project (50 Stat. 731, 16 USCA, sec. 832 et seq.), or the act authorizing the Fort Peck project (52 Stat. 403, 16 USCA, sec. 833), the United States would be in a much stronger position than the petitioner here to claim freedom from the obligation to pay for dam site value, for in each of the cited statutes Congress' declaration of purposes emphasizes navigation. None of them declares that encouragement of private power developments is a primary purpose, as does the Federal Power Act. This makes doubly significant the refusal of this Court, despite the insistences of Government counsel, to adopt the Chandler-Dunbar rule in the Powelson case, which arose under the T. V. A. Act.

Neither are we dealing with that type of case where the Federal Government has not taken respondent's property but has merely damaged it, which damage is *damnum absque injuria*. There was an actual taking of respondent's land in this case.

We respectfully assert that, if **First Iowa Electric Co-op. v. Federal Power Commission** is treated as construing sec-

tion 27 to preserve from supersedure only the state laws relating to irrigation, municipal and other similar uses, such holding was *obiter dictum* and not only is there no language in the Federal Power Act to sustain it, but the whole weight of pertinent words and parts of that Act is squarely against such a construction.

Section 4 (b) of the Act and Regulation 4.1 of the Federal Power Commission command the licensee to supply information as to "the price paid for water rights, rights of way, lands, or interest in lands." Regulation 4.41 of the Commission requires that the applicant for a license shall file Exhibit E, stating

> "* * * the nature, extent and ownership of water rights which the applicant proposes to use in the development of the project covered by the application together with satisfactory evidence that the applicant has proceeded as far as practicable in perfecting its rights to use sufficient water for proper operation of the project work. A certificate from the proper state agency setting forth the extent and validity of the applicant's water right shall be appended if practicable * * *."

It seems safe enough, since the typical applicant for a license from the Federal Power Commission has been and is a privately owned power company, to conclude that in using the words "water rights which the applicant proposes to use in the development of the project," the Federal Power Commission is speaking of **power** rights and not of irrigation or other municipal rights. In the case at bar, the top 10 feet of 147 feet of dam height is reserved for flood control and even that may be used for power generation when there is discharge of water from it (R. 463, 470). All the remaining 137 feet is devoted to power generation. Obviously, the licensee will not have "rights

to use sufficient water for proper operation of the project work" unless it has water power rights. Moreover, in view of the requirement that satisfactory evidence be supplied that applicant has proceeded as far as practicable to perfect its rights to use sufficient water, the Commission is referring to the perfection of rights under state law, because the Commission would have within its own file complete information as to whether the applicant had proceeded as far as practicable under Federal law. It is made clear that the reference is to state-created water rights by the requirement that there be supplied a certificate from the proper state agency. It would not be within the purview of a state agency to certify as to federally created rights.

The opinion in First Iowa Electric Co-operative, supra, expressly recognizes that the foregoing provisions of the regulations of the Federal Power Commission "are to satisfy section 9 (b) of the Federal Power Act and have to do especially with property rights in the use of water under the state laws and do not alter the legal situation presented by the Act itself." Footnote 16, 90 L. ed. 1152.

Section 14 of the Federal Power Act deals with recapture by the Federal Government and with condemnation of a licensed project by the United States, a State or a municipality prior to the expiration of the license. With respect to recapture by the Federal Government upon the expiration of the license, it is provided that the Federal Goverament may take over the project upon payment of the licensee's "net investment" and certain severance damages. The section then proceeds further to provide:

> "* * * Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this chapter, by the license or by

good will, going value, or prospective revenues; **nor shall the values allowed for water rights, rights-of-way, lands or, interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee;** Provided, That the right of the United States or any State or municipality to take over, maintain and operate any project licensed under this chapter at any time **by condemnation proceedings upon payment of just compensation** is hereby expressly reserved."

Thus there is clear provision for the including of the water rights recognized by state law, both in "net investment" and in "just compensation." That the water rights referred to must be those given by state law, and not by federal law, is shown again by the express denial of all allowance of value for the federal license, which is normally the only source of federal rights. Since the cost of such State derived water rights is recognized for the purpose of recapture by the Federal Government, it is a fair inference that Congress must have intended that they also be recognized in condemnation proceedings covered by the proviso which concludes this section. Inasmuch as the condemnee would be entitled to just compensation by virtue of the validity of the water rights under State law, and not by virtue of the condemnee's status as a Federal licensee, it follows that the non-licensed owner of state derived water rights which are being condemned as in this case, likewise would be entitled to just compensation for such rights.

Section 14 also means that if a State condemns a licensed project, the just compensation which it has to pay in that proceeding will be recognized as the "actual reasonable cost" and allowed in the net investment of the state as a licensee of the Federal Power Commission.

These conclusions are supported by decisions of the Commission and Circuit Courts of Appeals.

In **Alabama Power Company v. McNinch** (C. C. A. Dist. of Columbia 1937), 94 Fed. (2d) 601, the Commission and the Court of Appeals both approved the price which had been paid for riparian land, and the prices were obviously based on their value for the purpose of **generation of electrical energy.** At 94 F. (2d) 615, 616, the water rights referred to in Section 14 of the Federal Power Act are expressly treated as being water rights acquired under state law.

The same holding was made by the Court in **Alabama Power Company v. Federal Power Commission** (CCA Dist. of Columbia 1942), 128 F. (2d) 280. At page 283 of this opinion there is express recognition of water **power** rights.

In **Alabama Power Company v. Federal Power Commission** (CCA 5, 1943), 134 F. (2d) 602, the court approved the Commission's allowance of $150,000.00 for the cost of the dam site. This figure clearly appears to have been based on water **power** adaptability.

In **Alabama Power Company v. Federal Power Commission** (CCA 5, 1943), 136 F. (2d) 929, in effect the court held that the amount paid in condemnation proceedings should be recognized as actual reasonable cost. Since the other cited decisions show that both the Federal Power Commission and the Court of Appeals concur in the inclusion of the reasonable cost of power rights in net investment, it clearly follows that the price paid for water power rights in consequence of a condemnation proceeding is likewise entitled to be included in net investment.

Thus is demonstrated the fallacy of all that part of the first brief amicus curiae (p. 16, et seq.) and the second brief amicus (e. g., pp. 52-66), which rely upon the express

prohibition of Section 14 that net investment shall not include the value of the license, good will, going value or prospective revenue. The next following provision of the act, "nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof," shows that, contrary to the insistence of the briefs amicus, Congress thought that State water rights were entirely different things from any rights accruing from the Federal license or from good will, going value, or prospective revenue.

III.

STATEMENT AS TO CERTAIN FACTS.

(a) Purposes of Petitioner's Project.

Under the heading "questions presented" (p. 2), the project of the Grand River Dam Authority is referred to as a "power, **irrigation** and flood control project." The record, however, shows that the project is confined to power and flood control. The resolution of the board of directors of the Authority, which authorized the bringing of this suit, recited the determination of that body to construct "a dam and hydro electric power plant for the purpose, among others, of . . . generating . . . electric power and energy for sale and distribution . . ." (R. 539). The project is described as "for the purpose of flood control and the development of hydro electric power and energy" not only in the Authority's Declaration of Intention (R. 456), but also in the resolution of the Authority's board of directors accepting the license (R. 483) and in the findings of the Commission with respect to the Authority's Declaration of Intention (R. 486). Article 13 of the license specifically contemplates operation for the primary purpose of power production and the incidental pur-

pose of flood control (R. 470). There appears to be no evidence that irrigation was a purpose of construction. There appears to be no evidence that the Authority's purposes in the construction and operation of this project have differed in any particular from those which would have been adopted by any privately owned power company.

(b) The Claim of Hypothetical or Assumed Value.

Also, under the heading "questions presented" it is erroneously said, "In the state courts, the respondent claimed, and was allowed, compensation based principally upon the value of the lands as a site for a power project of substantially the same character as the petitioner had been licensed to construct." There are related misstatements, such as "The respondent's witnesses assumed, for purposes of valuation, that a power project similar to that which had been constructed by the Authority would be put into operation" (Second brief amicus, page 6). Attention is also requested to a recurring error in this brief, as in that which preceded it, namely, the references to "hypothetical power plant value," "assumed power site value," "hypothetical value" (idem, page 8), "hypothetical development" (idem, page 31), and "anticipated revenues from the hypothetical water power projects they assumed could be built" (idem, page 50). The inaccuracy of all such statements and implications is best demonstrated by a reading of the proof itself, which will show that in none of the minds of the witnesses who gave evidence as to value on behalf of Grand Hydro, the respondent, was there erected any imaginary project. The land which is being condemned in this case is not unique, for, as is characteristic of building sites generally, it will lend itself to different sizes and types of construction, and, like building sites generally, it further appears that a certain sized structure will probably be the most economical. As the witness Justin testified:

"Many heights dam might be economical at that site, but the most economical would probably be a dam somewhere from 130 to 150 feet high, but this site, there it is, and you have got to have that site before you can build a dam, and it has a certain value, and that value, of course, can be based only on judgment and experience, and a fellow might build a dam there, a low dam at first, and then a high one, or he might never build these high dams" (R. 337).

A dam from 130 to 150 feet in height would approximate the height of that built by the petitioner, which was 147 feet (R. 463). The brief amicus continually calls attention to that fact, obviously with the hope of prejudicing respondent's case, either by implying that respondent was merely a "promoter" in an uncomplimentary sense, or that the value awarded was actually value to the taker. The testimony of Wash E. Hudson (R. 112 et seq.), the exhibits which this witness filed (Defendant's Exhibits 1 to 16, inclusive), the testimony of Henry Freund (R. 240 et seq.), the exhibits filed by this witness (Defendant's Exhibits 19 and 23), the contents of the license to respondent from the Conservation Commission of Oklahoma (R. 129), and other evidence demonstrate that there is no ground here for any claim that petitioner did not enter upon this land in 1929 for the bona fide purpose of investigation and actual development, and likewise establish the ability of respondent to consummate any reasonable project upon this river.

As to the implied suggestion of the second brief amicus, that to allow consideration of adaptability to the construction of a dam about the same size as that built by the petitioner is actually to allow the award to include value to the taker, the following facts are pertinent. It appears fairly likely that the Authority obtained its ideas as to the size of the dam, and other details, from the report of Fargo

Engineering Company, which company was employed by the respondent to conduct a survey (R. 119). The report of the Fargo Engineering Company was dated May 28, 1929 (R. 392), more than six years before the Grand River Dam Authority was even created. The project finally built by the Authority was "very similar" to that covered in the Fargo report (R. 385). Even if the brief amicus were right in repeatedly charging that respondent's witnesses imagined a "hypothetical project," and that this hypothetical project closely corresponded to the Pensacola Dam as actually constructed by the Authority, this would show merely that realization has been substituted for hypothesis.

The ability of the respondent's representatives and engineers to apply their experience to this site, and to form judgments as to the best way of development, was not affected in the slightest by the petitioner's execution of the respondent's plans by building a structure in substantial conformity with them. Nor has the respondent's action in that respect affected in any way the authority of the Court to consider the adaptability of the site to the construction of a dam 147 feet high (although petitioner has built one just that high) or to a dam either higher or lower than 147 feet. The argument of the brief amicus apparently is that where the condemnor intends to build, and does build, a dam 147 feet in height, the condemnee cannot show that the site is adaptable to construction of a dam 147 feet in height. This is a refinement of an argument that the petitioner urged, and the court rejected, below, namely, that the value of condemned land should not be affected by consideration of its adaptability for the use to which the condemnor proposes to put it, because that would be allowing value to the taker. Thus if the state condemns a lot in the business section of a city to build a state office building, consideration of office building use is thereby precluded. Or if the state condemns a

farm for agricultural experiment, farm value cannot be considered. The fallacy of such reasoning is too obvious to discuss.

(c) The Date of Taking.

At page 29 of the second brief amicus there is a reference to the fact that the Authority's license was issued on July 26, 1939 (R. 475) "six months after the taking date" (R. 673). While it is true that the date, January 19, 1940, is sometimes referred to as the "date of taking," this language is misleading. Nothing occurred on that date except the payment into court by the Authority of the sum of $281,802.74 fixed by the Commissioners as the value of the land. Instruction No. 2 (R. 621) and see Journal Entry of Judgment, R. 650, 652. The date was principally significant as the date from which interest should accrue (R. 652). The assignment of water rights, execution of permission to enter respondent's lands, and deeds for part of the land involved had been executed by respondent to the Authority in 1938 (R. 135, 139, 47, 53, 54, 141) so that the date of actual taking of physical possession preceded the filing of this case in February 1939, as well as the granting of a license to the Authority in July, 1939.

IV.

THE DECISION OF THE COURT BELOW ON GROUNDS OF STATE LAW FORECLOSES REVIEW BY THIS COURT.

We wish to add one comment to our discussion of this subject already presented. See Respondent's brief on the merits, pp. 5-16.

There is no indication in the State court's opinions that it intended to decide any Federal question, or that it was

aware that it would be charged with deciding any Federal question.

To this situation the following reasoning should be applied:

> "The Supreme Court of Florida gave no opinion, and, therefore, we are left to conjecture as to the grounds on which the pleas were held to be bad, but if the judgment rested on two grounds, one involving a Federal question and the other not, or if it does not appear on which of two grounds the judgment was based, and the ground independent of a Federal question is sufficient in itself to sustain it, this court will not take jurisdiction. Dibble v. Bellingham Bay Land Company, 163 U. S. 63; Klinger v. Missouri, 13 Wall. 257; Johnson v. Risk, 137 U. S. 300; Bachtel v. Wilson, 204 U. S. 36; Adams v. Russell, 229 U. S. 353."

Cuyahoga River Power Company v. Northern Realty Company et al., 244 U. S. 300.

The petitioner cannot derive any benefit in this case from what it claims to be the principle of the Chandler-Dunbar case, that is that there is no right appurtenant to riparian land to use the flow of water for power purposes, because

(a) The petition in condemnation (R. 32 et seq.) does not show any connection of the petitioner, as licensee or otherwise, with the United States Government, by whom alone or through whom alone the claimed principle of that case can be asserted, and

(b) Under Oklahoma law and the decision of the highest court of that state in this case, the petitioner is estopped from asserting that the respondent had no such property interest. See respondent's brief on the merits,

pages 5-11. The petitioner is bound by the rules of the forum which it chose for the case.

CONCLUSION.

This court should either refuse to review this case, or should affirm the judgment below.

Respectfully submitted,

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